Agenda Date: 7/6/05
Agenda Item: 4A

STATE OF NEW JERSEY

Board of Public Utilities
Two Gateway Center
Newark, NJ 07102
www.bpu.state.nj.us

TELECOMMUNICATIONS

IN THE MATTER OF THE JOINT PETITION OF VERIZON COMMUNICATIONS INC. AND MCI, INC. FOR APPROVAL OF MERGER	)))	ORDER DOCKET NO. TM05030189

(SERVICE LIST ATTACHED)

BY THE BOARD:

The New Jersey Board of Public Utilities ("Board"), pursuant to N.J.S.A. 48:2-1 et seq., has been granted general supervision and regulation of and jurisdiction and control over all public utility systems which operate within the State of New Jersey. Moreover, the Board has specifically been granted the authority to review certain mergers and acquisitions by and of such public utilities, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10.

On March 3, 2005 Verizon Communications Inc. ("Verizon") and MCI, Inc. ("MCI") (jointly "petitioners") filed a petition for the approval of a transaction which would result in MCI becoming a wholly-owned subsidiary of Verizon ("merger").

On June 6, 2005, Staff convened a prehearing conference in order to discuss several issues pertaining to this proceeding. The meeting was attended by counsel for Board Staff, petitioners, the RPA, and several competitive local exchange carriers ("CLECs"), as well as the Advising Deputy Attorney General assigned to this matter. All parties at this informal meeting were afforded and took advantage of the opportunity to discuss possible procedural schedules and to express their concerns with regard to the sufficiency of timelines in light of expected discovery disputes. Considerable disagreement ensued over the appropriate time frames, and no consensus was reached regarding a procedural schedule. After weighing all the informal comment, Board Staff recommended a schedule that allowed for longer discovery periods than those imposed in another pending telecommunications merger proceeding before the Board involving two large carriers, but not as long as those advocated by the RPA and the CLECs.

The Board reviewed and accepted this recommendation in a Prehearing Order issued on June 8, 2005.

On June 20, 2005, the RPA filed a motion for reconsideration of the Board's Prehearing Order. The RPA alleges that the procedural schedule set out in that Order should be revised because it permits inadequate time for the completion of discovery. Specifically, the RPA anticipates, based on its experiences in the pending SBC/AT&T merger proceeding before the Board, that a voluminous amount of documents will need to be reviewed in this proceeding, and that significant prehearing discovery disputes between the RPA and petitioners are likely to occur. The RPA also believes that the Board-approved schedule does not permit sufficient time to collect relevant information before the deadline for the filing of pre-filed testimony passes. The RPA notes the strong public need to impose a schedule in this proceeding that allows a full and comprehensive record to be developed.

The RPA also alleges that the Board did not consider its concerns, expressed at the prehearing conference, regarding the appropriate length of the procedural schedule. The RPA interprets that schedule to preclude the submission of discovery requests prior to July. It notes that it served discovery requests on Verizon on June 17, 2005, answers to which are due, in the RPA's view, on July 5. In response to the perceived deficiencies in the Board's schedule, the RPA proposes postponing the filing deadline for Initial and Reply pre-filed testimony and hearing dates, as well as requiring that initial-stage responses to discovery requests should be served within 10 days of the request, with reply-stage responses due 3 days after receipt of the request. The RPA also recommends that the parties agree to a Protective Order as soon as possible to facilitate the exchange of discovery.

On June 23, 2005, the joint intervenor group of telecommunications carriers referred to as the Competitive Carrier Group ("CCG")[1] filed a letter in support of the RPA's motion. The CCG agreed that the Board's schedule does not afford it an adequate opportunity to conduct discovery and to collect sufficient information to present the Board with a complete picture of the effects of the merger on New Jersey consumers and local competition. The CCG contends that the Board's schedule violates the CCG's right to due process, and advocates the adoption of the RPA's proposed schedule. The CCG also seeks clarification that, pursuant to the Board's Prehearing Order, discovery requests may be served immediately.

Verizon filed a written response to the RPA's motion on June 23, 2005. Verizon contends that the RPA has presented no basis whatsoever for reconsideration of the Board's procedural schedule, as required by N.J.A.C. 14:1-8.6 and relevant case law. It points out that the RPA has failed to demonstrate that the Board's decision was premised on any material error of fact or law, or changed circumstances requiring reconsideration. Verizon characterizes the RPA's main position as a "rehash" of arguments that have already been considered by the Board.

Verizon also contends that the RPA's contention that the schedule allows inadequate time for discovery is incorrect. Verizon argues that the schedule provides adequate time to resolve any potential discovery disputes, and that it will work with the RPA and the Board to ensure that any

[1] *Broadview Networks, Inc.; DIECA Communications, Inc. d/b/a Covad Communications Company; CTC Communications Corp. and XO Communications Services, Inc.*

such disputes are resolved expeditiously. In a footnote Verizon also expresses its view that the Board's procedural schedule permits it until July 29, 2005 to answer the RPA's June 17 discovery requests.

The RPA filed a reply to Verizon's opposition on June 27, 2005, in which it contended that the Board should state that it has been fully appraised of the discovery concerns involved in this proceeding. The also referenced a recent Order issued by the Board's Presiding Officer in a different merger proceeding, in which the RPA's request for extra time due to ongoing discovery disputes was denied, based in part on the fact that such disputes had been foreseeable at the time the RPA had stipulated to the schedule. The RPA points to Verizon's belief that no discovery responses are due in this proceeding until July 29 as an example of the type of disputes that necessitate more time for discovery. The RPA also states that its motion will not adversely impact any party, and that permitting more time for discovery will aid in the development of a full and complete record.

Intervenor Qwest Communications Corporation ("Qwest") also filed a written response in support of the RPA's motion on June 30, 2005. Qwest agrees with the RPA that the current schedule permits insufficient time to conduct and review discovery. Qwest points to the Board's Prehearing Order in support of its contention that discovery requests may be served immediately. It also takes issue with Verizon's position regarding when, under the current schedule, discovery responses are due. Qwest cites N.J.A.C. 1:1-10.4(b) to require Verizon to respond to discovery requests within 15 days. Qwest interprets that July 29, 2005 date listed in the current schedule as the date that all discovery must be completed, consistent with N.J.A.C. 1:1-10.4(e), rather than the date on which all responses are due, irrespective of when the corresponding requests were served.

DISCUSSION

Absent a legislative restriction, administrative agencies have the inherent power to reopen or to modify and rehear prior decisions. In re Trantino Parole Application, 89 N.J. 347, 364 (1982); Skulski v. Nolan, 68 N.J. 180, 195 (1975); Ruvoldt v. Nolan, 63 N.J. 171, 183 (1973); Handlon v. Town of Belleville, 4 N.J. 99, 106-107 (1950). N.J.S.A. 48:2-40 expressly provides that the Board at any time may order a rehearing and/or extend, revoke or modify and order made by it. Tp. of Deptford v. Woodbury Terrace Sewerage Corp. 54 N.J. 418, 425 (1969); N.J. Bell Tel. Co. v. Bd. of Pub. Util. Comm'rs., 12 N.J. 568, 579 (1953); Central R. Co. of N.J. Dept. of Public Utilities, 7 N.J. Super. 254-255 (1951); Sudler v. Environ. Disposal Corp., 219 N.J. Super. 52, 62 (App. Div.) certif. denied 109 N.J. 56 (1987). An administrative agency may invoke its inherent power to rehear a matter "to serve the ends of essential justice and the policy of the law." Handlon, supra, at 107. The power to reappraise and modify prior determinations may be invoked by administrative agencies to protect the public interest and thereby to serve the ends of essential justice. Trap Rock Industries Inc. v. Sagner, 133 N.J. Super. 99, 109 (App. Div. 1975). Generally, however, a party seeking reconsideration of a Board decision must demonstrate special circumstances, such as material error, which justify reconsideration of the case. Thus, where there is a new development or new evidence relating to established facts or a material misapprehension by the Board concerning an essential matter which is critical to its final determination, there may be a reasonable basis for reconsideration of the Board's Order. See In re Trantino Parole Application, supra, 89 N.J. at 365.

N.J.A.C. 1:1-10.4 provides, in pertinent part:

(a) The parties in a contested case shall commence immediately to exchange information voluntarily, to seek access as provided by law to public documents and to exhaust other informal means of obtaining discoverable material
(b) Parties shall immediately serve discovery requests and notices and make discovery motions
(c) No later than 15 days from receipt of a notice requesting discovery, the receiving party shall provide the requested information, material or access or offer a schedule for reasonable compliance with the notice...

Neither the RPA, the CCG nor Qwest have presented any new arguments in their filings requiring this Board to reconsider its procedural schedule. Contrary to the RPA's assertions, the Board did consider at length and weigh the arguments and positions expressed by all parties at the prehearing conference regarding the amount of time necessary for a full and complete exchange of discovery. Such positions were expressed informally, off the record, and therefore not quoted or referenced in detail in the prehearing order. Moreover, the Board is fully aware of the importance of this proposed merger and its potential effect on the state of telecommunications competition in New Jersey, as well as on telecommunications consumers themselves.

The RPA and the CCG and Qwest had ample opportunity to express their views at the prehearing conference, and did so during an in-depth discussion of the varying lines of analysis the Board might undertake in order to render an informed decision regarding the four factors it must consider in reviewing this merger. These arguments were especially forceful with regard to the effect of the merger on competition. In short, the parties argued that a broad range of issues, including potential market power and other merger activity among competitive carriers would impact the Board's review of this merger, and that enough time should be allowed for discovery to encompass this range of topics. Staff and the Board weighed these views with those of petitioners and, based on its analysis of the scope and complexity of the issues and its extensive experience in the review of telecommunications mergers and other complex telecommunications proceedings, determined that, while a thorough airing of issues through discovery will certainly be necessary, this matter does not require 10 months to bring to conclusion, as asserted by the RPA and the CCG. The Board concluded that a schedule of that duration would constitute an unnecessary expenditure of Board time and resources. Nothing put forward by the RPA in the instant motion or the CCG in its supporting papers is substantively different from the arguments put forward previously, or serves as grounds for reconsidering the Board's conclusion.

To the extent the Prehearing Order was unclear regarding when discovery may commence (although in our opinion it was not), clarification is in order. As stated by the CCG and Qwest, discovery requests may be served at any time, and no party need wait until July 20, 2005 to do so. July 20 represents the *last* date on which such requests can be served. This interpretation is consistent with both the language of the Order and relevant portions of the Administrative Code. See N.J.A.C. 1:1-10.4(b).

Similarly, Verizon has apparently misinterpreted another important element of the Board's schedule, which requires clarification. The basic discovery response deadlines set forth in N.J.A.C. 1:1-10.4(c), which require that requests be answered in 15 days, or that a response time be agreed to between the requesting and providing parties, N.J.A.C. 1:1-10.4(c), are reasonable and shall be adhered to in this matter, subject to the Board's schedule clearly contemplating that all discovery activity, including responses, must be completed by July 29, 2005. This does not mean however, that requests served on Verizon in, for example, mid-June

need not be responded to, *per se*, until July 29. Such a delay would unnecessarily limit the receiving party's use of any information contained in that response and also limit the time available for the resolution of discovery disputes arising therefrom. Verizon is **HEREBY ORDERED** to provide responses to the aforementioned RPA discovery requests, and to any other requests served on or before June 17, 2005, no later than July 11, 2005, or at such other date as may be negotiated between the parties.

Based on the foregoing, the Board hereby **DENIES** the motion for reconsideration filed by the Division of the Ratepayer Advocate in this matter.

DATED: 7/6/05

BOARD OF PUBLIC UTILITIES
BY:

JEANNE M. FOX
PRESIDENT

FREDERICK F. BUTLER
COMMISSIONER

CONNIE O. HUGHES
COMMISSIONER

JACK ALTER
COMMISSIONER

ATTEST:

KRISTI IZZO
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities

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